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IN THE

# Supreme Court of the United States

October Term, 1952

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ALBERT G. DICKINSON,

*Petitioner,*

*against*

E. LEWIS BURNHAM and JAMES A. VAUGHAN, et al.,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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### Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1069), filed on June 24, 1952, is reported in 197 F. (2) 973. The opinion of the District Court (R. 35-202) on the merits is in part reported at 11 Fed. Rules Serv. 489; id. 885). The final judgment of the District Court (R. 468-500) is not reported.

### Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

# STATEMENT OF THE CASE

## Summary Statement

### A. History of the Litigation

Pursuant to motion of counsel for Petroleum granted by the District Court on October 25, 1943 Burnham & Vaughan were permitted to intervene herein on condition that other pending actions, set forth in a Stipulation (138, 141)[1] be discontinued. The order permitting intervention of Burnham & Vaughan was entered December 3, 1943 (138-9; 169) and they filed an answer to the complaint, and a counterclaim on January 2, 1944 (170).

### B. The Facts

The petitioner "proffers * * * an exculpatorily innocent interpretation of the events, skillfully woven from the documentary and uncontroverted evidence" (R. 1071). Inaccuracies and omissions in petitioner's statement make this statement necessary. The record discloses the facts to be:

> Knox and its successor, Petroleum, were patent-holding companies.

The Knox plant located at Texas City, Texas "was a large scale pilot or test plant for the purpose of developing certain advanced procedures in vapor-phase (oil) cracking * * * it was not a commercial plant" (2983).[2]

Prior to Dickinson's purchase of $20,000 par value Knox bonds in September, 1923 he had been interested in a method for the internal application of heat as applied to sub-

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[1] Figures in parenthesis refer to folio numbers unless preceded by the letter "R" indicating pages of the record.

[2] The first commercial plant built to operate under the Knox-Petroleum patents was completed in 1930 (2988) and in 1937 Petroleum received $200,000 as a paid-up royalty on this plant alone (3065).

stances other than oil (2952). Due to the alleged similarity between that method and the method employed under the Knox patents he took a "flyer" and bought the Knox bonds in order "to be in * * * one of the big developments in the oil industry" (2084-85).

Late in 1924 Dickinson met Lloyd, President of Knox, in New York, where he told him "the condition the company was in, that it was bankrupt * * * and was in debt for construction work" (2089) and fully disclosed the Knox records to Dickinson (2860-63). Dickinson thereafter went with Lloyd to Texas City, Texas, where they met the attorney representing creditors holding approximately $168,000 liens filed against the Knox pilot plant and 50 adjoining acres (18, 2091-93). He testified that he did not on that visit, or prior to his purchase of the Knox plant upon lien foreclosure on December 21, 1925, have any correspondence or personal conversations with the lienors (3003); that he did not "at that time * * * bind "himself to the lienors or their attorney" (2098); that he "didn't make a firm commitment to take up the liens at that time;" that he "didn't put up any money * * * at that time"; that he "hadn't guaranteed any obligation of any kind"; that he "never agreed with anyone to take up the liens"; that he had not used his credit in any way or legally obligated himself in connection with Knox (3054-57; 303N); that he "wasn't in a position to furnish money to the company for men who were ten to twelve times more able than (he) was to take care (of the liens)" (3056).

Contemplating aid from Dickinson in connection with a plan for the refinancing of the liens the Knox Board on November 13, 1924 authorized Lloyd to make any contract he deemed advisable with Dickinson. Nothing was accomplished under this proposal (642).

Dickinson, one of the largest owners of Knox bonds, made thorough investigation of the condition and status

of Knox late in 1924 and early in 1925, including conferences with Lloyd in New York City and Grand Rapids, Michigan (2089-90); a visit with Lloyd to Texas City, Texas and interview with the attorney representing the lienors (18, 2091-93); interview with Knox Advisory Board in New York while Lloyd was in Europe and later met the full Board with Lloyd (2447); personal investigation, with his attorney and accountant, of Knox records (2860-63) and to the knowledge of Rinke "spent days" with Lloyd (2478, p. 3 of Ex. 45-B).

What Dickinson and Lloyd saw in the overall Knox situation, as clearly revealed by their own records, was:

1) That responsible men of standing (2518-20; 2199-2214), whom Dickinson recognized as early as December, 1924 "were ten to twelve times more able than I (Dickinson) to take care of (the liens)" (3056), had already made a large cash investment in Knox bonds and it was self-evident to Dickinson and Lloyd (2452), and also to Rinke (2478, p. 3 of Ex. 45-B), that these men would have to protect the equity of their investment (2486; 3124);

2) That for this reason, as Lloyd advised Dickinson in writing as early as January 7, 1925 and prior to creation of the Rinke Agency on February 26, 1925, there would be no enforced lien foreclosure sale—"the bondholders have a million dollar investment to protect" (2486);

3) That through a partnership arrangement with Lloyd, Dickinson would be in a position to develop and extend his claims of use of his Convector apparatus in the oil refining industry (2085), to which end Dickinson's son, an engineer, early in 1925 became, and continued as, a Knox employee "past the middle of 1928" (708-9; 3006) located at Texas City (2957-58) as Dickinson's representative "re-

porting constantly, daily writing of what progress was being made" (708; 3005)—"He was there for that purpose" (3011);

4) That "in getting control of this property" (Knox plant) there was "not only security but * * * the gamble of great profit is really tremendous" (3121-25). Dickinson agreed "perfectly * * * provided the work of the drive on the bondholders is continued to success," and proposed the purchase of the liens "on the basis of fifty cents on the dollar (to) be paid for by the Company at face value with interest" (309-10).

Thus fortified, Dickinson negotiated a "partnership" agreement with Lloyd, knowing that Lloyd was a director and the principal executive officer of Knox (3034-35). On January 6, 1925 Lloyd "thought (he) had very clearly explained to (Dickinson) when (they) talked in Grand Rapids" what their arrangement was (2455, 2456, 2470), but on February 20, 1925 Dickinson requested written confirmation specifying what he was to receive, including "one-half of the amount of stock which is to be derived from the protection of the liens" (20,600 shares) (2511-12). And on March 2, 1925 they entered into an agreement in writing (2374-82) the main purpose of which was to provide for a division of their profits (648).

Immediately following Dickinson's request, the Knox Board met on February 26, 1925 (Lloyd attending) and passed resolutions[3] which in form provided for two methods to solve the Knox lien problem. By the first method the Knox Board again contemplated the aid of Dickinson

[3] (2492-2505) erroneously purports to be the Minutes of a Special Meeting of Knox Board held on February 26, 1925. That part of the minutes of such meeting which are there omitted are supplied at 3082-88).

(2492-2505); by the second method Rinke was to acquire the liens with funds subscribed through Arthur W. Rinke, Agent (the "Rinke Agency") (3082-88).

The intent and purpose of the Knox Board in passing this resolution was to provide one method for solving the lien problem whereby Dickinson would buy in all or part of the liens for cash. "All advances or investments made by Dickinson in or in connection with said liens (were to) be liquidated by the company solely by the issuance of stock at par therefor, upon surrender of the liens to the company" (645; 2502). Dickinson was to be reimbursed in stock, not in cash (287-88, 294, 429), a fact which he shortly thereafter complained about (317, 318).

The 20,600 shares were a gift to Dickinson (643; 307). Prior to the Knox Board meeting and on February 7, 1925, Lloyd in letter to Dickinson referred to this block as a "bonus of stock" (304, 2489). Rinke, who prepared the Dickinson-Lloyd agreement of March 2, 1925, in letter to Dickinson dated February 27, 1925 likewise referred to such shares as "a bonus"—but a bonus in which Lloyd was to have a one-half interest (2775; 307). Lloyd had not used the credit standing of Dickinson for the benefit of the company and Dickinson had not rendered valuable services to Knox in connection with the liens, the alleged reasons for the gift as recited in the preamble to said resolutions (643-44; 2867-70).

Thus five days prior to the Knox Board meeting on February 26, 1925 and on February 20, 1925 (2511, 2512), Dickinson had requested a written agreement with Lloyd dividing such shares 50-50 between them and five days after such board meeting, on March 2, 1925 (2377), the Dickinson-Lloyd profit-dividing agreement was executed. Writing Dickinson on February 27, 1925 the details of his preparation of the Dickinson-Lloyd profit-sharing agreement of March 2, 1925, Rinke stated he would "recite in the instrument" the use of Dickinson's "credit in connection with

he liens as the consideration for the (Knox) deal" (2773-9).

1. The method by which the Knox Board contemplated he aid of Dickinson was mere scheme-scenery so far as Dickinson and Lloyd were concerned. Both knew that Dickinson would not make any money advance thereunder. Lloyd repeatedly so assured Dickinson from time to time 308-9; 2467-68) and finally on February 17, 1925, upon orwarding a copy of subscription agreements, Lloyd again ssured Dickinson that "when there are sufficient subcriptions in hand to warrant the establishment of credit o permit raising of additional funds when necessary, I vill suggest to you then making the advances *under our greement*" (305-6) (emphasis supplied). Furthermore Dickinson knew that it was "no new thought of (Lloyd's) hat a reorganization (of Knox) was inevitably necessary (and) the longer the lienors delay foreclosure proceedings, he more the interest secondary to these liens will provide o keep the wheels moving"—Lloyd suggesting "the purchase of an interest in some of these liens, * * * (to be) able to dictate the policy of reorganization" (3117-20).

Their own plan whereby Dickinson was to purchase the liens at less than face value—"our present plan" (discussed infra)—then being in progress, Dickinson on April 18, 1925 agreed with Lloyd "perfectly * * * in moving to get control of the liens at this time, that is, provided the work of the drive on the bondholders is continued to success. These liens should be secured in such a manner so that they can be paid for by the Company at face value with interest. My suggestion is that they should be obtained by us on the basis of fifty cents on the dollar. * * *" (309-10).

Lloyd was fearful, and so advised Dickinson, that the Rinke Agency Subscribers would "provide much more than necessary to take up the liens on the 50-50 basis, but if this were done, there would be no use for you (Dickinson) and me (Lloyd)" (329).

Five months after "accepting" the Knox resolution Dickinson, having agreed to divide the "bonus stock" with Lloyd and disregarding his understanding with Knox, decided he wanted cash, not stock. Writing Lloyd on July 21, 1925, he found "the resolution of (February 26, 1925) enclosed inconsistent with *our present plan,*" that is, Dickinson's proposed plan to purchase the liens at "50¢ on the dollar," but expecting to be reimbursed by the company in cash at the face value of the liens (317-19). By letter dated July 27, 1925 Rinke (not Lloyd) "endeavor(ed) to answer the third paragraph" of Dickinson's letter to Lloyd. That paragraph relates exclusively to the Dickinson-Lloyd "present plan" whereby they contemplated the purchase of the liens at 50¢ on the dollar (320, 322; 2758-63).[4]

By letter and by his testimony Rinke refuted Dickinson's assertion of an agreement, suggestion or proposal between him and Rinke whereby, if Dickinson had acquired the liens at 50¢ on the dollar of their face value, that he, Rinke, agreed to pay Dickinson the full face value of such liens (320, 321; 326-27; 2870-71; 2872; 2832-35; 2826).

2. The second method for solving the Knox plant lien problem was also provided at said Knox Board Meeting on February 26, 1925 (3082-88). It was on this method that Dickinson and Lloyd, with the connivance of Rinke, wholly relied to mulct the Subscribers.

The purpose of the Rinke Agency was to provide *funds* with which to acquire the liens (630-31). Under five Agency Agreements, $597,542.50 was paid to Rinke, Agent, in cash by over 100 subscribers (630-32, 639).

A sufficient number of shares to liquidate all of the liens was reserved by Knox (3087). The intent of the resolu-

[4] This proposed scheme, "our present plan", to purchase the *liens* was in fact discarded but the same scheme was employed five months later in the Lloyd bid for the *property* (Knox plant) (2290-96).

tions was to give the subscribers par value in stock for face value of any liens that were acquired by Rinke, Agent (647).

The principal subscribers were the Knox bondholders who had previously invested some $860,000 in Knox bonds. They were being asked to protect their investments by subscribing to the Rinke Agency Fund (330-31).

Lloyd formulated the plans to raise money through the Rinke Agency and then discussed them with others of his own choice (2940-41; cf. 316-17). To meet the progressively changing schemes of Dickinson and Lloyd the five agreements were required, their respective provisions and representations varying from time to time to meet such schemes.

Under the *First Agency Agreement* (2723-27) $104,150.00 was subscribed and paid to Rinke during the period January 2, 1925 to August 8, 1925, $27,500.00 of which was paid to Knox directly by the Subscribers (635). Rinke was authorized to invest the money received in Knox stock, or in liens, but Rinke failed to do either (2822-23).

Under the *Second Agency Agreement* (2728-33) $127,260.00 was subscribed and paid to Rinke Agent, during the period May 29, 1925 to December 23, 1926 (635).

By an agreement between Knox and Rinke dated June 2, 1925, Rinke agreed to advance funds to Knox and protect it so far as possible in connection with the liens filed against its plant. For such advances and for all liens acquired and delivered by Rinke, Knox agreed *inter alia* to deliver its stock (639-42; 312-16).

Significantly this Second Agency Agreement was put into use when Dickinson and Lloyd were scheming to put into effect "our present plan," whereby Lloyd suggested that Dickinson acquire some of the liens at less than their face value and Dickinson countered with "50¢ on the

dollar'' in cash—18,000 of the 20,600 shares of Knox stock received by Dickinson as ''bonus stock'' being included later as a part of such plan (3119-20; 3122-23; 311; 309-10; 329; 318-19; 325-27).

The Second Agency Agreement recites that Rinke had a license whereby he could operate under the Knox patents ''in the event of his foreclosing any lien,'' and Rinke agreed under paragraph FOURTH thereof ''to apply forty (40%) per cent of the money received * * * for the acquisition of liens * * * *or so much thereof as may be required for that purpose* * * * '' (2728-29; 2731) (emphasis supplied). As explained by Rinke to Dickinson the 40% reserve provision would secure Dickinson against any advance he might make to purchase the liens for Knox since 40% ''of the contemplated $500,000 of subscriptions will make available * * * an amount adequate to reimburse you (Dickinson) as the new owner of the liens for all cash advanced'' by Dickinson (320-21). But the overriding scheme whereby Dickinson would purchase the Knox plant *property* ''at 50¢ on the dollar,'' *in lieu of the liens*, was meantime developed with such acceleration that an undated alleged amendment to paragraph FOURTH was added to a few of the Second Agency Agreement forms after July 27, 1925 authorizing Rinke, in the alternative, to apply the money received by him ''in purchasing the Texas *property* * * * by whomsoever the said property may have been or may hereafter be acquired * * * '' (2734). Removal of the 40% restriction by the alleged amendment would enable Rinke in his discretion to make available larger amounts for Dickinson under ''our present plan,'' had Dickinson purchased the liens, and also under the overriding scheme should Dickinson purchase the Knox plant property upon foreclosure of the liens. The formula and basis for both schemes was the same, i.e., ''Thru the proposed Lloyd deed of trust and pay for them (the liens or the property) one-half in cash and one-half in stock,'' the stock being avail-

able out of the 20,600 shares bonus stock "thru the resolution" and "the cash would be advanced by you (Dickinson) until * * * you (Dickinson) would turn the liens (or property) over to me as Agent and I, as Agent, would pay you (Dickinson) the cash that you had disbursed" (325-27; 2290-97; 655-56). On December 5, 1925 Lloyd explained to Dickinson that it was to avoid any "chance of anyone antagonistic to our efforts being able to show collusion" that their plan to acquire the liens was discontinued (339). Thus when the Dickinson-Lloyd schemes changed the Agency Agreement forms were correspondingly altered.

Rinke's statement to Dickinson on July 27, 1925 that "the directors, and also the substantial Subscribers * * * all thoroughly comprehend that someone is to buy up the liens and then sell them to me as Agent at face amount" (320) was patently false and directly contrary to his specific agreement "to apply forty (40%) per cent of the money received * * * hereunder for the acquisition of liens * * * or so much thereof as may be required for that purpose" (2731-33).

Caution was exercised in connection with the release of the Second Subscription Agreement. A notice of its method of financing the Company was to be sent to all security holders but the form thereof was to be "determined by (Lloyd)" (316-17).

The *Third Agency Agreement* (2737-45) was put into use November 11, 1925 and discontinued January 18, 1926 (632). $800.00 was received by Rinke, Agent, from Subscribers under this Agreement and transferred to the Fourth Agency Agreement, on Rinke's accounts (638).

The Third Agency Agreement, the first to recite that $600,000 was the Rinke Agency goal, provided that the first application of money received thereunder was: "1. For the acquisition of *liens* in whole or in part, now or hereafter filed against the plant of Knox Process Corporation at

Texas City" (2739, 2742) (emphasis supplied). Since Dickinson had acquired *title* to the Knox *plant* on December 21, 1925, in lieu of the liens, such representation was false and the use of the Third Agreement form was promptly terminated.

Meantime, immediately after the Knox plant was purchased by Dickinson, Lloyd wrote Dickinson on December 30, 1925 advising of "the exact condition of affairs" with Rinke Agency and that there was "available collectible funds" of $109,039.60, or "approximately $30,000 more than it would take to see you (Dickinson) and me (Lloyd) on the cash profit side of this transaction" (3109-11). No attempt was made to use these Agency funds to purchase the Knox plant or the liens thereon at the cash discount to the advantage of the Subscribers who had no knowledge of the Dickinson-Lloyd scheme (2914-15).

The *Fourth Agency Agreement* (2746-51) was put into use January 21, 1926 (632), one month after Dickinson had acquired title to the Knox plant on December 21, 1925 (656-57) and the same day on which he "advanced" the cash balance of $82,310.28 of his bid (657-58; 348; 454-55).

Under the Fourth Agency Agreement $169,625.00 (including the $800.00 transferred from the Third Agency Agreement) was subscribed and paid to Rinke, Agent, during the period from January 26, 1926 to December 27, 1926.

Prior to the inception of the Fourth Agency Agreement the representations of each agreement were directed to "the acquisition of the liens." With the advent of Dickinson as owner of title to the Knox plant, new and different representations to the Subscribers—not to disclose but to conceal—were formulated. For the first time Rinke, as Agent for the Subscribers, was identified in an Agency Agreement form with the Bondholders' Protective Committee. The Fourth Agreement announced Rinke's ap-

pointment as "Agent" also for the Bondholders' Committee, the sale (but not to whom) under foreclosure of liens of most of the physical assets of Knox, the "right" of that committee to acquire property formerly of Knox and to organize or co-operate in the organization of a new corporation and to sell and convey property to such new corporation (2746-48), thus inducing the belief that the rights and interests of the Subscribers and the rights and interests of the Bondholders' Committee had already become, or were about to be, merged for the common benefit. And to keep apace with the execution of the scheme Rinke of course "agreed" under this Fourth Agreement to apply the Subscribers' money received by him for the acquisition of property formerly of Knox or an interest therein (2748). But no part of the moneys subscribed to the Rinke Agency Fund was used by Rinke to purchase the plant and real estate (50 acres) at Texas City, against which the mechanics' liens had been filed (667). Nevertheless the fiction of the "liens" was continued for purposes of deception (368-69) by Rinke (478-83), and by Dickinson as late as January and February, 1937 in his protestations of innocence (421-28) and assertion that he "furnish(ed) the necessary money to take care of the liens" (422; 2782).

As of the effective date of the Fourth Agreement, Dickinson had "advanced" $87,310.28 cash, or one-half the total liens of $174,620.56, and had been repaid $5,000 from the Agency funds as the balance of a "loan" of $10,000 (ostensibly made as the full or part down payment with Lloyd's bid) (653-54; 657, 348).

Six months prior to the inception of the Fourth Agency Agreement Rinke, in letter to Dickinson dated July 27, 1925, set forth the Dickinson-Lloyd scheme originally devised in connection with the proposed purchase of the liens (327) but in fact subsequently employed in the purchase of the Knox plant property (2290-96), and advised

Dickinson that with respect to any cash "advanced" by Dickinson he, Rinke, would repay Dickinson (327).

Significantly the Fourth Agency Agreement is silent with respect to the purchase of the Knox plant by Dickinson although the date of its inception and the date of such purchase were approximately simultaneous. Dickinson had "advanced" $87,310.28 on January 21, 1926 and held title to the property. On January 30, 1926 Dickinson requested Lloyd "in the next 'conference' to go into the reorganization plans and plans for control." Dickinson trusted that Lloyd was "holding to the determination to see that the bondholders furnish all the money for the payment of the property * * * before operations start" (357), and in repayment of his "advance" he was "not particular where (the money) comes from" insisting "it should be forthcoming at once" (3107). Lloyd was sure that Dickinson agreed with him "that we ought to have the other fellows' money and none of our own in it" (367).

On June 29, 1926 Lloyd advised Dickinson that he was calling a meeting of the Directors to face "the issue to complete the $600,000 subscription * * * the full 100% in money has got to be paid to us covering the total amount of the liens * * * there is only one way that I have in mind and that is for you and me to get ours and that we are going to do" (485-86).

Two days after Lloyd's letter to Dickinson and on July 1, 1926 Rinke, the fiduciary, aiding Dickinson and Lloyd to attain their fraudulent ends, addressed a letter to the Subscribers (478-80, N5). In the light of the subsequently discovered facts it is the epitome of double talk, replete with false and deceiving statements, significantly concealing and misleading (481-88). It served its sole intended purpose—the solicitation of additional funds from the Subscribers from whom the truth was withheld. It did not inform the Subscribers of any facts which would apprise them of the frauds (738).

Under the *Fifth Agency Agreement* (2752-57) $186,082.56 was subscribed and paid to Rinke as Agent, during the period from July 26, 1926 to December 20, 1926. Subsequent to December, 1926, Rinke received $10,425.00 on subscriptions which he did not assign to any particular agreement but listed under the heading, "Free Subscriptions" (638, 639).

With a letter dated July 14, 1926, Rinke, as Agent of the Bondholders' Committee, transmitted to the bondholders the form of the fifth subscription (2595). Again significantly neither the letter nor the subscription form disclosed Dickinson's purchase of the Knox plant on December 21, 1925 (2752, 2757).

The form of the Fifth Agency Agreement announced the sale (but not to whom) of the Knox physical assets; the "organization" of Petroleum;[5] that $410,000 had been raised; the desirability and necessity that $190,000 additional be raised to complete the $600,000 goal, and that upon completion thereof Rinke was authorized to accept two shares of Petroleum stock for each $5.00 paid by Subscribers, past and present, in order that the Subscribers should participate on a parity with the bondholders.

Pursuing his custom to keep Dickinson informed from time to time "regarding money with the agent (Rinke)" Lloyd on August 16, 1926 wrote Dickinson giving a list of "unsigned subscriptions." This list included "Dickinson * * * $25,000" (3135). Although Dickinson testified to the contrary (3044-45), nevertheless he did publicly at a dinner meeting of Knox bondholders and Subscribers make such subscription but never paid any part of it (389; 2614; 2061; 372-73).

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[5] Petroleum was incorporated March 25, 1926, but its organization meetings were not held until December 14 and 15, 1926 (668; 2218; 2278) immediately following the final cash "profit" payment to Dickinson and Lloyd on December 10, 1926 (659-62).

A restriction in the Fifth Agency Agreement forbade use of funds until the goal of $600,000 subscriptions had been reached (2754-55). To enable him to obtain "a balance of $25,310.28 and interest on the whole amount" of $87,310.28 at once, Dickinson authorized Lloyd "to subscribe for the Eighty-seven Thousand Dollars, or the balance of the lien money * * * the subscription to be replaced by cash subscriptions as procured" (2633-34).

Dickinson was fully informed from time to time as to the Rinke Agency financial conditions. As of August 20, 1926 he knew that "more than four hundred thousand dollars have been in hand" (361). Dickinson was no less sure than Lloyd of their cash "profit." In advance of its collection they planned its use (361-2).

On September 7, 1926 there was paid to Dickinson from the Rinke Agency funds, by direction of Lloyd (659; 3136-37), the balance of the $87,310.28 "advanced" by Dickinson for the Knox plant, together with interest at 6% thereon (659-60; 45-46; 366-67). Dickinson was thus made whole (367). Dickinson had escaped from his fear of "holding the bag" (367) since he received one-half of Rinke's payments to Lloyd of $15,000 on September 14, 1926; $15,000 on September 28, 1926; $30,000 on October 11, 1926, and on December 10, 1926 Rinke paid Lloyd $27,310.28. By agreement between Dickinson and Lloyd this $27,310.28 was used in market operations in Petroleum stock (660-61; 2614).

Thus in the private arrangement of Dickinson and Lloyd to reorganize Knox for their own personal gains (648-49) Dickinson's and Lloyd's own records disclose that during the lien problem period, after Dickinson's advent, Dickinson and Lloyd operated under three distinct schemes which for their secret purposes required changes from time to time in the Rinke Agency subscription agreement forms and brought about the several Rinke Agency agreements, viz.:

1. An initial common understanding between them, prior and subsequent to February 26, 1925, that no money advance would be made by Dickinson as contemplated by the Knox Board in resolutions passed at meeting on that date as affecting Dickinson (2492-2504; 305-6; 3115-16; 308-9; 3117-20). Nevertheless Dickinson was voted "a bonus of stock" of 20,600 shares, as forecaster Lloyd advised Dickinson on February 7, 1925 (2489).

2. Disregarding the Knox resolutions of February 26, 1925 contemplating the aid of Dickinson, and at least as early as April, 1925, Dickinson and Lloyd schemed to purchase the *liens*, Lloyd suggesting the purchase of an interest in some of the liens in order "to dictate the policy of reorganization" (3117-20). He was sure the liens could be bought for "less than 100% on the dollar" (3121-24) and whatever they could be bought for less than their face value would be "cold profit" (311). Dickinson agreed perfectly "provided * * * the drive on the bondholders is continued to success" and the liens "be paid for by the Company at face value with interest (and) they should be obtained by us on the basis of fifty cents on the dollar" (309-10). Lloyd was sure that on the "fifty cents on the dollar" basis the liens would be bought by the bondholders-subscribers and "there would be no use for you (Dickinson) and me (Lloyd)" (329), but the Subscribers never had such an opportunity.

Discarding the scheme to purchase the *liens* late in 1925 Dickinson and Lloyd conspired to acquire title to the *property* (Knox plant) in the name of Dickinson by purchasing same at lien foreclosure sale at the cash price of "fifty cents on the dollar" of the face amount of the liens, or $87,310.28, plus 18,000 shares of Knox stock, and thereafter to pay

to themselves in cash from Rinke Agency funds through the connivance of Rinke, $174,620.56, the full face amount of the liens, such payments to be falsely designated as payments on account of "advances" for liens and property (651; 3097-4000; 454-55; 594-96).

"In this manner," Lloyd advised Dickinson on December 5, 1925, "we will get the title properly cleared and there can be no possible chance of anyone antagonistic to our efforts being able *to show collusion*" (339) (emphasis supplied).

Thus Dickinson's and Lloyd's own records reveal that the Rinke Agency Agreement forms were moulded to fit the Dickinson-Lloyd schemes to mulct secret cash profits from the Subscribers and that the varying representations therein respectively were made concurrently from time to time wholly to screen the aforesaid three distinct schemes perpetrated by Dickinson and Lloyd in their overall objective "to get ours."

No accounting for the $597,542.50 subscribed and paid to Rinke, Agent, was ever made by Rinke to the Subscribers (633; 639; 2820-22).

Rinke did not use any of the Rinke Agency funds to acquire or liquidate the liens on the Knox plant. In disbursing the funds of the Rinke Agency, Rinke was completely dominated and controlled by Lloyd (633).

Rinke did not produce at the trial records to support his disbursements but described and estimated most of them except some $70,000 for which he could not give any explanation (1394-95).

At least as early as April, 1925 Dickinson and Lloyd were scheming to reorganize Knox for their personal "profit" and "control" (3117-25; 307-10).

On April 15, 1925 Lloyd wrote Dickinson that he was "perfectly satisfied that less than 100% on the dollar any time would settle any of these claims, if the creditors were properly educated as to their position" (3121-22). An employee of Knox, one Steenman, had been active among the lien creditors under direction of Lloyd, with the knowledge of Dickinson, prior to the lien foreclosure sale (2088; 2447; 2484; 3003-04).

Dickinson was fully informed of the lien foreclosure proceedings prior to his bid being made for the Knox plant (2780-83).

On December 5, 1925 Lloyd fully advised Dickinson of his proposed bid, whereby " • • • we will get the title properly cleared and there can be no possible chance of anyone antagonistic to our efforts being able to show collusion" (337-39). By Dickinson's authorization dated December 8, 1925 (2780-83) Lloyd on behalf of Dickinson submitted a bid of $87,310.28 cash plus 18,000 shares of Dickinson's "bonus" of 20,600 shares Knox stock allegedly trusteed to Lloyd and tendered a check of $5,000 "advanced" by Dickinson (2563-64), as down payment and a "Declaration of Trust" reciting, *inter alia,* that he had received from Dickinson and held in trust for the lien-holders said 18,000 shares of Knox stock represented by certificates numbered 10 to 33 inclusive (2291-94; 2298-99). The Knox stock certificate book discloses that no such certificates were ever issued (2836-38). Lloyd's bid, the only one made for the Knox plant, was accepted December 21, 1925.

The balance of $82,310.28 of the cash bid price was paid by Dickinson to the Special Commissioner on January 21, 1926 and Dickinson received a deed dated January 2, 1926. This deed, fully setting forth the consideration, was not recorded until a year later, on January 7, 1927 (658) following the organization meetings of Petroleum.

At least as early as October 4, 1926 and prior to Lloyd's bid "the general scheme" of reorganization was presented to Dickinson in writing (370-76), including the Petroleum set-up (372).

Between January 25, 1926 and September 7, 1926 Rinke paid Dickinson from the Agency funds the sum of $87,310.28 in installments on various dates (659) plus interest of $1,624.28 thereon. Dickinson continued to hold title to the Knox plant until the organization of Petroleum on December 14-15, 1926 (660). In addition, Rinke paid Dickinson and Lloyd from Agency funds an additional $87,310.28 cash "profit" herein discussed at p. 16. For that money neither Dickinson nor Lloyd transferred or assigned anything of value to the Subscribers, or to Rinke as their trustee (652-53, 492). It was a fraudulent scheme by which Dickinson obtained $87,310.28 plus interest, and Dickinson and Lloyd divided between them an additional $87,310.28 of the funds of the Subscribers for whom Rinke was a trustee.

On February 13, 1926 Rinke, as Agent for the Bondholders' Committee, at foreclosure sales, bought the Knox patents for $25,000 and on August 5, 1926 bought the remaining 91 acres of Knox land at Texas City for $10,000 (664-65), with funds subscribed to the Rinke Agency (678). Of this sale Dickinson "had a notice from Loeffler * * * the Commissioner" (2136).

Assertions by petitioner that his bid was made on the assumption that Knox was to continue are wholly without support. The record is to the contrary (3117-25; 337-39). Surely there is no indication of dissatisfaction in Dickinson's letter to Lloyd on January 30, 1926 (3127-29). Dickinson testified that he had a conference at Attorney Gifford's office in New York between January 7 and 21, 1926 "with Mr. Lloyd, Mr. Gifford, and *Mr. Rinke*" but that there was no discussion at that conference with reference

to a new corporation to take over the property formerly of Knox (2135) (emphasis supplied). Yet attorney Gifford's diary discloses that on January 12, 1926 he "had conference with Mr. Lloyd, Mr. Dickinson and *Mr. Sanderson* (Dickinson's son-in-law) with reference to steps to be taken in *reorganization of company*" (2215-16) (emphasis supplied). Dickinson also testified that he thought he was buying the liens and not the property (336). Yet he was fully advised by Lloyd on December 5, 1925 of the terms of the proposed bid for the Knox plant upon foreclosure of liens stating, *inter alia*, "In this manner, of course, we will get the *title* properly cleared * * *" (337-39) (emphasis supplied). And on December 4, 1926 Lloyd reminded Dickinson that "you and I are in line to make considerable value out of a stock which we are about to establish a value for. We have been doing this for over two years" (387).

Thus with the cash "profit" in sight they were ready to and did proceed with the next step in their fraudulent schemes (668), viz., the organization of Petroleum.

Petroleum, "a replica of Knox in financial structure" (270), was incorporated under the laws of Delaware on March 25, 1926 with an authorized capital stock of 1,200,000 shares, par value of $5.00 each (668). The first meeting of the Board of Directors was held on December 14, 1926 and an adjourned meeting on December 15, 1926, by three dummy directors (682; 2218).

The organization of Petroleum conformed to the scheme outlined by Lloyd to Dickinson on October 4, 1926 (370-76). Lloyd was sure the scheme would satisfy Dickinson (375). It did (376-77). Prior to December 4, 1926 Dickinson read the organization documents before they were presented to the Bondholders' Committee and the directors of Knox (2700).

On December 7, 1926, by an exchange of letters, Lloyd on behalf of Petroleum agreed to the sale by Rinke to Petroleum of 91 acres at Texas City and certain patents, formerly of Knox, in exchange for 590,400 shares of Petroleum stock—240,000 shares to be issued to Rinke as Agent for the Subscribers and 350,400 shares to be issued as Agent for Knox Bondholders' Protective Committee. With respect to these shares Lloyd imposed, and Rinke without authorization accepted, "restrictions" against sale (2241-42). Rinke accepted the offer by letter dated December 7, 1926 (668-69; 2246-51) and assigned, transferred and conveyed such property to Petroleum.

Similarly on December 7, 1926 Lloyd on behalf of Petroleum offered to purchase the Knox plant from Dickinson in consideration of 609,600 shares of Petroleum stock, 469,600 of which he agreed to have issued in Dickinson's name or his designee (they were actually issued in Lloyd's name and without "restrictions" against sale), 140,000 of which were issued in Lloyd's name and by him transferred and delivered to Petroleum as treasury stock (669-71; 2252-56).

The offers and acceptances submitted by Lloyd to the Petroleum dummy Board of Directors on December 14, 1926 were part of the fraudulent scheme to obtain for Dickinson from Petroleum an amount of stock in excess of that provided under the resolution of Knox directors on February 26, 1925 (674), which was 79,928 shares (or twice 34,964 at 2 for 1) (489-90).

Shares so issued to Rinke were computed on the basis of 400 shares for each $1,000 par value of Knox bonds deposited with the Committee and of 400 shares for each $1,000 subscribed and paid in, respectively (681). The stock provided to be issued to Dickinson, a bondholder and nonpaying public subscriber to the Rinke Agency, was computed on the same basis (2148).

Prior to the organization of Petroleum and on October 4, 1926, Lloyd had advised Dickinson that he would hold the stock issued to Rinke, Agent, after its issuance (372). And he did! This stock was delivered ten years later in 1937 by direction of Petroleum's Board after the disappearance of Lloyd in October, 1936 while under investigation (732-34).

Despite Dickinson's testimony to the contrary (2138-39), prior to the organization of Petroleum on December 14-15, 1926, plans in "the general scheme" were actively under consideration by Dickinson and Lloyd. On December 22, 1925, the day on which Lloyd was notified of acceptance of his bid on behalf of Dickinson to purchase the Knox plant, Lloyd advised Dickinson in writing of the "general plan" (341, 343-47); according to his diary Attorney Gifford, on January 12, 1926, "had conference with Mr. Lloyd, Mr. Dickinson and Mr. Sanderson with reference to steps to be taken in reorganization of (Knox)" (2215-16); on January 20, 1926, Dickinson requested Lloyd "in the next 'conference' * * * to go into the reorganization plans and plans for control" (3127-29); on February 10, 1926 Lloyd felt that Dickinson had "the organization plans * * * very clearly in mind" and proposed "the organization of PETROLEUM CONVERSION CORP'N" (3130-33), and by October 4, 1926, when the "second $87,000" was in sight and "the general scheme" became definite, Lloyd wrote Dickinson in detail as to the reorganization procedure, adding assurance that he would "see to it" that their Petroleum stock would be sold to the public "when it is quoted on the curb" (370-76). Immediately expressing his approval, Dickinson on October 7, 1926, wrote Lloyd: "I take my hat off to you for the manner in which you are framing this to our advantage * * * " (376-77).

The Dickinson block of 469,600 shares, being without sale restrictions, was so-called "free stock" or "loose stock" (390-91). Three months prior to the organization

of Petroleum Dickinson and Lloyd planned to use their share of this block and part of the cash from the "second $87,000.00" Rinke agency payment in Petroleum stock market operations (3137-38). From "the very first day" it was sold simultaneously with the 140,000 shares of Petroleum so-called treasury stock (3070-72). Lloyd figured that "this will leave for you (Dickinson) and for me on the deal alone anywhere from $600,000 to $700,000 par" (374) and Dickinson's hat was off to him (377).

On December 8, 1926 Lloyd received from Rinke the balance of the "second $87,000," of $27,310.28, "in lieu of subscription of $25,000 which we made at the dinner" (389). On the same day Rinke advised Dickinson that he was sending to Lloyd $27,310.28 in connection with "the release of liens" (390). Dickinson agreed to its use in market operations in Petroleum stock (662; 377; 386-87).

Out of the "free stock" Lloyd set aside 244,041 shares for the stockholders of U. S. Gasoline Manufacturing Corporation (the predecessor of Knox) which he confided to Dickinson on January 21, 1928, enabled him to retain control of Petroleum (391). For the same reason Dickinson sought possession and control of this same block of stock after Lloyd's disappearance on October 26, 1936 (692-93; 217-19) by demand of Dickinson, Sanderson and Rinke as "Trustees" under a purported Declaration of Trust by Lloyd (692; 723-26; 215-16; 218-19), for the delivery thereof. Inquiry ordered by the Petroleum Board as to the merits of such demand led to the disclosure of the Dickinson-Lloyd frauds, part of the subject matter of this litigation (723-26; 219).

During the years 1927 to 1929 Lloyd was engaged in extensive market operations in Petroleum stock, with Dickinson, his son-in-law Sanderson, and Rinke actively participating (695; 3139-41; 3142-44; 3145-47; 3148-50; 309; 411-12).

The stock market having collapsed meantime, Dickinson made demand upon Lloyd on May 5, 1931 for one-half of $27,310.28 or $13,655.14, with interest (415-16), although Dickinson had authorized Lloyd to use same for their joint account in stock market operations in Petroleum stock (696; 385-86).

**C. The Decisions Below**

"The acts through which the fraud was perpetrated on the Subscribers were not discovered until the early part of 1939. The intervenors, Vaughan and Burnham, served their answer and counterclaim in (the District) Court in January, 1944" (597-98), well within Section 48(5) of the New York Civil Practice Act.

In affirming the judgment below on the merits, the Court of Appeals, referring to the merits of the intervenors' counterclaim, said in part:

> "(Dickinson) has taken issue with a series of the findings by the district court and proffers, instead, an exculpatorily innocent interpretation of the events, skillfully woven from the documentary and uncontroverted evidence, on which he bases a claim of error in the findings. We are unable, however, to find grounds for holding these findings 'clearly erroneous' under F.R. 52(a)" (R. 1071; see also R. 1074).

## SUMMARY OF ARGUMENT

### POINT I

If important or novel questions actually exist in Petitioner's Class Action Argument their determination is not required in solving any controversy between the petitioners and respondents.

### POINT II

Questions now presented—as to (1) applicability of Section 48(5) of the New York Civil Practice Act, (2) petitioner's demand for trial by jury of the issues raised by his answer to the claims of the subsequently intervening members of the class, (3) knowledge by Subscribers of fraudulent payments out of the Rinke Agency funds to petitioner (and Lloyd), (4) the Rinke "release", and (5) Petroleum, not the Subscribers, had the claim for the misappropriated Rinke Agency funds—were raised at the trial, considered and determined by the trial court, on all the facts and the law, in his exhaustive opinions which were unanimously affirmed by the Court of Appeals. Selected facts and construction thereof most favorable to petitioner should not serve as a basis for re-litigation.

## ARGUMENT

## POINT I

**If important or novel questions actually exist in Petitioner's Class Action Argument their determination is not required in solving any controversy between the petitioners and respondents.**

### A.

The principal points relied on by petitioner (pp. 2-3; 17-23, pars. 1-4)[1] in the so-called "Class Action Argument" may be summarized as follows:

The decision below raises "important" and "novel" questions of federal law in that:

(a) the Court below said so.

(b) Difficulty was (and is) experienced in correctly classifying the type of these suits (i. e.—true; hybrid or spurious).

(c) The holding of the Court of Appeals that there was a fund (i. e. a constructive trust) is contrary to other decisions; and

(d) The holding violates due process requirements.

We shall demonstrate that if important or novel questions actually exist—their determination is not required in solving any controversy between the petitioner and respondents.

Petitioner was the plaintiff in an action begun in 1938 to impress a lien on stock of defendant Petroleum. Certain defrauded investors intervened. Their claims, based upon common questions of law and fact and seeking a common relief, were presented by two representatives of the

[1] Page references to petition are indicated "P".

class. This intervention was permitted by the District Court and consented to by plaintiff-petitioner.

The claim pressed by the class through their representatives was identical in scope to the counterclaim asserted by the intervenor, Petroleum, against plaintiff-petitioner.

As petitioner points out (Br. P. 8), the claim of Petroleum was dismissed by the District Court, in a decree labeled by this Court as "final". *Dickinson* v. *P. C. C.*, 338 U. S. 507, 94 L. ed. 299. So, too, were plaintiff-petitioner's claims. The District Court however, entered a money judgment in favor of the class and against petitioner and Lloyd's Estate. An examination of that decree, October 17, 1946 (R. 203-51) and order, April 9, 1947 (R. 252-4) will show that the trial court rendered a final determination of all issues between plaintiff and the class, and set the amount at $176,245.24 with interest, as in the decree set forth. At that point, had the Court (as it could have) directed the issuance of execution, that would have been an end to this case—except for the appeal on the merits, just decided adversely to plaintiff (197 F. (2) 973)—because the trial court's findings were not, as the Appellate Court pointed out, "clearly erroneous". Indeed, on any examination of the record, it would be impossible to reach any other conclusion.

If the Court had issued an execution against the plaintiff on the judgment in favor of the class, it could have provided for a retention of juridiction (the case was in equity) to determine any questions that might thereafter arise with respect to a division of any recovery on the judgment. That the Court retained jurisdiction to determine those questions *prior* to issue of execution, does not change the principle involved, namely that it was the *final determination of the trial court that members of the class were entitled to recover a fixed and determined sum of money from plaintiff*. At that point, all matters respecting the facts forming

the basis of that determination between all the *parties* (including the class), the amount of recovery and every other element necessary to support a *final* judgment had been resolved. Principles of *res adjudicata* applied.

> "A. What the court reserved was essentially supervisory jurisdiction over the distribution among the class of the recovery awarded the intervenors as the class' representatives. The only questions were, so to speak, internal to the intervening interest." *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507, 514, 94 L. ed. 299, 304.

What followed was a determination *as between members of the class,* as to whom should share in the recovery already granted, and in what proportions, etc.

Such a proceeding, while grafted on to the main suit, was in every respect ancillary to it. It was similar to any situation where having determined in a litigation that defendant may recover against plaintiff the Court goes on to adjudicate between *defendant and others* (his assignee or some other undisclosed party in interest identified with defendant) who shall share in the recovery. Plaintiff has no need—nor propriety in controverting who ultimately may share in the recovery against him. His obligation to pay a sum of money to a person (collectively or individually) has been fixed. It would seem, therefore, that on such questions (i. e., the division of the sum awarded) plaintiff is not entitled to be heard.

So in the case at bar, Dickinson was required to pay to the representatives of the intervenors (Burnham and Vaughan) the sum of $176,245.24 and interest. If he paid that, he was forever protected by the judgment and payment thereunder.

Accordingly, examined in this light, we have this situation:

1. Representatives of a class of defrauded investors asserted a claim in a pending action and were awarded a judgment for money on the collective claim of all investors similarly situated (ordinary class action where one of a class asserts a right on his behalf and behalf of all similarly situated). There is nothing novel about that situation.

2. Having finally determined the right of the entire class against plaintiff—and all issues between the plaintiff and all members of the class (whoever and how many they may be)—the Court retained jurisdiction over the class representatives to determine *as between them and members of the class,* how the recovery (or judgment or "claim") should ultimately be determined. If that created a "novel" situation, it was a "novel" situation in which a determination was sought and accomplished, and such determination could have no bearing upon or relation to plaintiff.

Therefore, plaintiff-petitioner is in no position today to urge that decisions or determinations reached in that proceeding (or in that phase of the main litigation) involved any rights of plaintiff. If by the determinations below, error has been committed in apportioning the recovery, *as between members of the class*, that error cannot help or hurt plaintiff and, accordingly, the "novelty", if any exists in any question so determined, involved a proceeding (or phase of a proceeding) to which plaintiff was neither a necessary or proper party. Plaintiff cannot attack that proceeding but is limited in any attack to the questions: Did the trial court have jurisdiction to determine between plaintiff and the intervening class the issues it adjudicated? Are the findings in the judgment (or decree) entered on those issues, "clearly erroneous" under Federal Rule 52(a)?

It is submitted, that there is no novelty presented by such questions. On the contrary, the action and the issues determined fall within an ordinary fraud action which motivates a Court in holding in favor of those defrauded and against the instigator and perpetrator of the fraud.

Wholly in accord with the above indicated procedure of retaining jurisdiction after determination of all issues on the merits as between petitioner and the Subscribers—to supervise distribution of the recovery awarded among the members of the class—the trial Court ruled that such procedure would be limited to any question with respect to the right of any member of the class (his representative or transferee) to assert his claim as a holder of Rinke Agency receipts, or as a subscriber under the Rinke Agency agreements (1181-1184; 1203). The trial Court anticipated that the proof would be documentary (1201). An "answer" was not at any time subsequent to the decision on the merits "directed" by the trial Court, as stated by petitioner (P. 24).

Further, the order of the trial Court (972) does not "recognize" that petitioner could raise issue with respect to individual claims beyond the Court's said ruling. Nevertheless petitioner's contentions based on his "answer" were considered by the trial Court in his opinion on the individual claims of members of the class who intervened and disposed of adversely to petitioner (R. 468-500).

Although the motion to vacate petitioner's Interrogatories was granted by Judge Coxe nevertheless the trial Court subsequently permitted Interrogatories to be served on each subsequent intervener (2168). Significantly petitioner elected not to make such Interrogatories a part of his transcript of record on appeal. He therefore has no ground for complaint as to the personal factors of deception, knowledge and discovery of the facts.

## POINT II

**Questions now presented—as to (1) applicability of Section 48(5) of the New York Civil Practice Act, (2) petitioner's demand for trial by jury of the issues raised by his answer to the claims of the subsequently intervening members of the class, (3) knowledge by Subscribers of fraudulent payments out of the Rinke Agency funds to petitioner (and Lloyd), (4) the Rinke "release", and (5) Petroleum, not the Subscribers, had the claim for the misappropriated Rinke Agency funds—were raised at the trial, considered and determined by the trial court, on all the facts and the law, in his exhaustive opinions which were unanimously affirmed by the Court of Appeals. Selected facts and construction thereof most favorable to petitioner should not serve as a basis for re-litigation.**

### B.

The acts through which the fraud was perpetrated on the Subscribers were discovered early in 1939 and reported to Petroleum's Board February 9, 1939 (725). Interveners Burnham and Vaughan served their answer and counterclaim in the District Court in January, 1944 (597-8), well within six years of discovery under the New York Practice Act, Section 48(5).

Between Dickinson and Lloyd there existed a common plan or scheme to appropriate funds of the Rinks Subscribers to their own use through the medium of deceit (594). The claim which Burnham and Vaughan asserted for the Subscribers against Dickinson and Lloyd is for the payments made to Dickinson and Lloyd by Rinke as a result of such scheme, which was fraudulent in its essence (597). Their claim is not barred by the New York Statute of Limitations (598, 750, 761).

## C.

From all the evidence the District Court found that the Dickinson-Lloyd plan or scheme whereby they misappropriated Rinke Agency funds was not disclosed to any Knox bondholders or Rinke Agency Subscribers and said bondholders and Subscribers had no knowledge with respect thereto (651-3; 492-5). If by "documentary evidence" petitioner refers to Dickinson's deed (which expressed the consideration) to the Texas City property, it is to be noted that Dickinson withheld recording of the deed (402-3); if he refers to the Subscription Agreements, it is to be noted that none refers to the sale of said property to Dickinson nor was there disclosure of payments to Dickinson or to Lloyd of any of the Rinke Agency funds subscribed (494-5). Petitioner does refer to a letter dated July 1, 1926 to the Subscribers as informing them of the balance due for the "liens" but that letter was unadulterated double talk, as the trial Court pointed out (478-88).

The fiction of the "liens" was used to screen the frauds of the Dickinson-Lloyd scheme from the beginning, and extended throughout the life of the Rinke Agency, and extended by Dickinson for purposes of deception until 1937 (434, 426-n, 423-n-426-n).

If "uncontroverted evidence" refers to testimony of Dickinson and Rinke (Lloyd had been declared dead at the time of trial (418) the Court said *inter alia*, "Dickinson and Rinke testified at the trial before me. They are unworthy of belief" (417-18).

## D.

From all the evidence the trial Court found that the interveners, Burnham and Vaughan, did not release petitioner or Lloyd from any claims that they had against Dickinson and Lloyd (750).

When Rinks distributed Petroleum stock to the Subscribers in 1937, some ten years after the organization of the company and after Rinke Agency was terminated, he incorporated in his transmittal letter to the Rinke Agency receipt holders a "release" clause (495-501). It was no protection to Dickinson as a defense to the claim of Burnham and Vaughan, as interveners. It was not only without consideration to support it (502) but the Subscribers had been defrauded, and they did not know of the fraud when they signed the letter of transmittal (502-3). Moreover Rinke was performing a duty which he should have performed many years prior to 1937 (502) but failed to do so in deference to Dickinson and Lloyd who, like himself, were engaged in market operations in Petroleum stock in 1927-1929 (694-5).

## E.

Petitioner likewise renews his contention that the Dickinson-Lloyd misappropriation, "if misappropriation there was", damaged Petroleum and not the Subscribers.

The Rinke Agency was not a capital-raising device for Petroleum. It expired November 15, 1926 with the termination of the Fifth Agency Agreement (632) and prior to the organization of Petroleum on December 14-15, 1926.

Despite Rinke's testimony as to transfer of the balance of Rinke Agency funds to Petroleum, his Agency Account discloses that on December 13, 1926, the day before Petroleum's organization meeting, Rinke paid by check from the Agency funds "to Wm. A. Fine, Special" the sum of $26,845.79 (2398). Rinke identified Fine's check, used two days later on December 15, 1926, whereby Fine paid Lloyd $25,000, the check being endorsed by Lloyd, "for deposit" (2907-9). Fine also was a tool of Lloyd's (458) and Rinke could not recall ever refusing to draw a check for Lloyd (2838-9). There is no record that Petroleum actually received any Rinke Agency funds.

Moreover, the Dickinson-Lloyd money frauds were consummated in 1926, during the life of Knox and prior to the organization of Petroleum.

## Conclusion

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari be denied.

Respectfully submitted.

Dated: October 22, 1952.

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